No. 14693

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAY W. BENTLEY, RAYMOND L. RUSNAK and JOSEPH HOMAN,

Appellants,

v.

ROSEBUD COUNTY, MONTANA, a body corporate,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

BRIEF OF APPELLANTS

BROWN, SANDE & FORBES,

Attorneys for Appellants

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Jurisdictional Statement

(1) Jurisdiction of district court.

The jurisdiction of the district court is based upon *Section 41 (1), Title 28, U. S. C. 1940 ed.,* providing that the district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 and is between citizens of different states. Paragraphs I, II, III and IV of the Complaint (Trans. pp. 3 and 4) allege that May W. Bentley was a citizen of Oregon, Raymond L. Rusnak and Joseph Homan were citizens of Illinois, and Rosebud County, Montana, Roy M. King, sometimes Roy King, Celia I. King, Edward L. Grebe, sometimes E. L. Grebe, and Caroline Grebe were citizens of Montana, all at the time of the commencement of the action. Therefore, it was alleged that all the plaintiffs were citizens of states different from the state of which the defendants were citizens.

Paragraph V of the Complaint (Trans. p. 4) alleges that the matter is a civil action and that the value of the title of the land and the rents and profits therefrom, which is the matter in controversy, is of the value in excess of $3,000.00. Exhibit 1 affirmatively shows the proof of these facts.

(2) Jurisdiction of Circuit Court of Appeals.

The jurisdiction of the Circuit Court of Appeals is based upon *Section 227, Title 28, United States Code.* Judgment was entered by the district judge on January 26, 1955 (Trans. p. 33). Notice of appeal was filed by the appellants on February 18, 1955, within 30 days from entry of Judgment as required by Section 227, *supra.*

Specification of Errors

I.

The court erred when it concluded as a matter of law that the description of the real property contained in the County Treasurer's Certificate of Tax Sale, dated July 15, 1936, was not ambiguous to the extent that would invalidate the tax deed, dated January 15, 1943.

II.

The District Court erred in admitting the testimony of H. D. Young to the effect that the description of the real property in the said Certificate of Tax Sale is certain and could not refer to any land other than the land described in the tax deed. The testimony of H. D. Young appears in the Transcript at pages 41 to 43. The objection made to his testimony is as follows:

> "To this question we object on the grounds it is incompetent, irrelevant and immaterial and not the best evidence." (Trans. p. 42)

III.

The District Court erred in concluding as a matter of law that the proceedings that were conducted by the officers of Rosebud County complied with the requirements of the laws of Montana applicable thereto, and that the said tax deed was a valid instrument.

IV.

The District Court erred in entering judgment for the appellee, Rosebud County, Montana, declaring that Rosebud County is the sole owner and entitled to receive 6¼% royalty of all oil and gas produced and saved from the premises involved herein, and for costs.

Statement of the Case

This case concerns the ownership of a 6¼% royalty interest in oil and gas on certain lands situated in Rosebud County, Montana, which royalty interest was purportedly reserved by the County of Rosebud in a deed from the County of Rosebud to one Roy M. King and Edward L. Grebe, former defendants in this action. The ownership of this 6¼% royalty interest is the only matter to be determined in this cause, since a compromise has been made between the plaintiffs and all of the defendants except Rosebud County, Montana, concerning all of the other interests in the land involved, and the defendant Rosebud County, Montana, claims only the said 6¼% royalty interest in the said lands.

The ownership of the 6¼% royalty interest depends upon the validity of tax deed proceedings undertaken by Rosebud County, Montana; the plaintiff May W. Bentley was the owner of the lands at the time of the tax proceedings by Rosebud County, Montana, and the plaintiffs Raymond L. Rusnak and

Joseph Homan find title to a portion of the said lands from May W. Bentley.

To simplify the trial of this cause in the District Court, copies of all of the instruments connected with the tax title proceedings of Rosebud County, Montana, were attached to a Stipulation, which is Plaintiffs' Exhibit No. 1. The instruments attached thereto are marked Exhibits A through E. Plaintiffs' Exhibit No. 2 and plaintiffs' Exhibit No. 3 are deeds showing the title interest of May W. Bentley, Raymond L. Rusnak and Joseph Homan. Defendants' Exhibit No. 4 consists of a certified and authenticated copy of a judgment roll entitled Roy M. King, Plaintiff, v. William LaFurge et al. The foregoing are all of the exhibits before this Court and together with a short transcript of testimony constitute the whole of the evidence in this cause. None of the exhibits were printed in the transcript by the clerk of this Court, but the original exhibits are available for the use of the Court.

This case does not involve any factual conflicts whatsoever, i.e., there is no conflicting testimony and no conflict of fact contained in the exhibits.

This appeal therefore is confined strictly to the proper law to be applied to uncontradicted facts, to which this brief is now directed.

Argument

I.

THE TAX TITLE PROCEEDINGS UNDERTAKEN BY ROSEBUD COUNTY, MONTANA, ARE INVALID AND THE TAX DEED ISSUED TO ROSEBUD COUNTY, MONTANA, IS VOID.

There is no dispute in the record regarding plaintiffs' title

and ownership of the 6¼% royalty interest up to the time of tax deed proceedings by Rosebud County, Montana. The tax deed proceedings by Rosebud County, Montana, are void for two reasons, viz., (a) the Affidavit and Proof of Service executed by the clerk and recorder of Rosebud County and delivered to the treasurer of Rosebud County was insufficient to give the treasurer of Rosebud County jurisdiction to issue a tax deed to the lands involved to the defendant Rosebud County, Montana, and (b) the County Treasurer's Certificate of Tax Sale does not contain a sufficient description of the real property involved, thereby rendering the whole of the tax proceedings void.

(a) We first discuss the insufficiency of the Affidavit and Proof of Service, which is part of Exhibit 1 (E), but since the instrument is short and its contents essential to the determination of this cause, we are setting forth the instrument here in its entirety, to-wit:

"AFFIDAVIT AND PROOF OF SERVICE

GUY W. GRAY, being duly sworn, on oath deposes and says:

That he is the duly elected, qualified and acting County Clerk of Rosebud County, Montana;

That *May W. Bentley,* named in the Notice of Application for Tax Deed attached hereto, *is* the owner..... of the property described therein, and that....., and that no other person, firm or corporation owned or held any portion of said property, or any other mortgage thereon, according to a search of the Rosebud County records;

That he served a copy of the attached Notice upon *May W. Bentley* by depositing in the Post Office at Forsyth, Montana, an envelope containing a copy of said Notice, securely sealed, with postage both regular and for registration thereon, and marked "Return Receipt Requested", said envelope..... being addressed as follows:

May W. Bentley, Madison, Wis.,

That the said letter..... was returned and *is* on file in the

Office of the County Clerk of Rosebud County, Montana;

That he caused to have a notice of application for Tax Deed published in the Forsyth Independent for two consecutive weeks as is further shown by affidavit of publication which is on file in the office of the County Clerk of Rosebud County, Montana;

That the property described in said Notice is unoccupied;

That the property described in said Notice of Application for Tax Deed, for which Rosebud County claims title because of unpaid taxes thereon, pursuant to Section 2209 of the 1935 Revised Codes of the State of Montana, as amended by Chapter 105 of the 1939 Session Laws of the State of Montana, is as follows, to-wit:

All Section 15, Township 11 N. Range 32 E. M.P.M.

Guy W. Gray
County Clerk.

Subscribed and sworn to before me this 4 day of January 1943.

J. J. McIntosh
Notary Public for the State of Montana.
(Seal) Residing at Forsyth, Montana.
My commission expires August 14th, 1943."

A copy of an instrument entitled "Notice of Application for Tax Deed" is referred to in the foregoing exhibit and was attached to same. We are also setting forth in its entirety the Notice of Application for Tax Deed, which is also part of Exhibit 1 (F), to-wit:

"NOTICE OF APPLICATION FOR TAX DEED.

To: May W. Bentley

You will please take notice that upon the 15 day of July, 1936, All Sec. 15, Tp. 11N. Rg. 32 E. M.P.M.

was after due and legal notice, sold for taxes; that said taxes upon the date of sale, to-wit: upon the *15* day of *July, 1936,* amounted to the sum of *Ten and 89/100 ($10.89)* Dollars, which was the amount paid at said sale by the County of Rosebud, Montana, who is now the owner and holder of Certificate of Sale covering said above described lands and premises; that there is now due to the County of Rosebud the aggregate amount of *One Hundred fifty nine and 60/100 ($159.60)* Dollars.

That subsequent to said sale and prior to the date hereof there have been duly assessed and levied against said real property taxes for the years *1935-36-37-38-39-40-41-42* which said taxes have become delinquent;

That the period within which the said above described lands and premises may be redeemed from the sale to pay the taxes for the year *1935* has long since expired, and that the undersigned will, on the *15* day of *Jan, 1943,* which will be at least sixty (60) days after the service of this notice upon you, make application to the Treasurer of Rosebud County for tax deed to be issued to it as provided by law.

That there is, therefore, now due to the undersigned, by virtue of the matter hereinafter set forth, the total aggregate sum of *One hundred fifty nine and 60/100 ($159.60)* Dollars, being the total amount of the taxes, penalties, interests and costs for the years *1935-36-37-38-39-40-41-42* which said amount is necessary to be paid before redemption can be made.

Dated this *13* day of *Oct.,* 1942.

ROSEBUD COUNTY, MONTANA,

By *Guy W. Gray*
Clerk and Recorder"

It is important to note at this point that the only instruments filed with the County Treasurer of Rosebud County are those instruments marked as Exhibit 1 (E) and that all of the instruments marked Exhibit 1 (D) were filed only in the office of the Clerk and Recorder of Rosebud County and *were not* filed with the County Treasurer's office. In other words, the only documents before the County Treasurer at the time the tax deed was issued were the Affidavit and Proof of Service heretofore set out, a copy of the Notice of Application for Tax Deed which was referred to in the Affidavit and Proof of Service and also heretofore set out, and an instrument called "Request for Tax Deed" which was neither verified nor referred to in the Affidavit of Proof of Service.

The insufficiency of the Affidavit of Proof of Service is determined by the case of

Perry v. Maves, (1951),
125 Mont. 215,
233 Pac. (2d) 820.

This case from the Montana Supreme Court in 1951 determines the requirements necessary to obtain a valid tax deed insofar as it concerns the Affidavit of Proof of Service. The Perry case, *supra,* has not been modified or reversed, and therefore, we submit, is controlling on this Court under the doctrine of *Erie Railroad Co. v. Thompkins,* 304 U. S. 64. In the Perry case, *supra,* the county clerk and recorder filed with the county treasurer an affidavit which stated:

> "That on February 13, 1940, the undersigned filed in the office of the County Clerk and Recorder of McCone County, Montana, an Affidavit and Proof showing the manner in which said Notice of Application for Tax Deed was given, all as provided by the laws of the State of Montana, to which Affidavit and accompanying proofs you are hereby referred."

The Montana court held that this affidavit was insufficient to give the county treasurer jurisdiction to issue a tax deed, the Court quoting from

Jensen Livestock Co. v. Custer County,
113 Mont. 285, 295, 296, 124 Pac. (2d)
1013, 1018, 140 A.L.R. 658,

as follows:

> "the county treasurer's jurisdiction to issue a tax deed must rest upon the affidavits of service required by the legislature to be filed with him."
>
> "Furthermore, the treasurer was not authorized to issue the deed. . . . Under the statute his jurisdiction arises solely from the affidavits of service which are filed with him, and not merely from the fact of service or from his knowledge of it otherwise than through the affidavits. . . . In other words, the treasurer has no jurisdiction to issue a

> tax deed until there has been filed with him 'an affidavit showing that the notice hereinbefore required to be given has been given *as herein required'*, etc." (citing cases)

Since under the law of Montana the jurisdiction of the county treasurer to issue a tax deed must be determined solely from the affidavit of proof of service filed with him by the purchaser of the lands (in this case the County of Rosebud, Montana), it is apparent in this pending action that the Affidavit of Proof of Service is insufficient to give to the county treasurer of Rosebud County, Montana, jurisdiction to issue a tax deed to the County of Rosebud for the reason that *the Affidavit of Proof of Service does not state when the Notice of Application for Tax Deed was served or attempted to be served upon May W. Bentley*. In other words, the county treasurer of Rosebud County, Montana, could not determine from the Affidavit of Proof of Service that the Notice of Application for Tax Deed was served, either by mailing or otherwise, at least 60 days before the county applied for a tax deed, which is required by *Section 2209, Revised Codes of Montana, 1935,* which reads in part as follows:

> "The purchaser of property sold for delinquent taxes or his assignee must, at least sixty days previous to the expiration of the time for redemption, or at least sixty days before he applies for a deed, serve upon the owner of the property purchased, if known, and upon the persons occupying the property, if the said property is occupied . . . a written notice, stating that the said property, or a portion thereof, has been sold for delinquent taxes . . ."

Under the doctrine of the Perry case, *supra*, the defective failure to include in the Affidavit of Proof of Service a statement as to when service was made upon May W. Bentley is fatal to the tax title proceedings and the tax deed issued by the county

treasurer to Rosebud County, Montana, is void and no title at any time therefore vested in Rosebud County, Montana.

Nor is this defect cured by the publication that was made. It cannot be determined from the Affidavit of Proof of Service when the first publication was had, since the Affidavit of Proof of Service refers to an Affidavit of Publication not filed with the county treasurer, but retained in the office of the county clerk of Rosebud County, Montana, in direct contravention to the doctrine enunciated in the Perry case, *supra. Section 2209, Revised Codes of Montana, 1935,* requires that the first publication of the notice of application for tax deed must be made at least sixty days before the application for the tax deed.

Though the doctrine announced by the Perry case, *supra,* may seem technical or even harsh, it is beyond any doubt the law of Montana, and as the court said in that case:

> "Proceedings on tax sales are *in invitum*. Every essential or material step described by the statute must be strictly followed. If the requirements of the statute are not strictly followed, the sale may be avoided. In the county treasurer's proceedings to sell the lands, there is no distinction recognized between the mandatory and directory requirements of the statute. The county treasurer must act as the statute directs. Otherwise he acts without authority and the purported sale which he assumes to make is invalid. This holds true even though the requirement with which the county treasurer failed to comply was not one enacted for the protection of the owner of the land."

Upon the trial of this cause, the appellee Rosebud County, Montana, maintained that the copy of the Notice of Application for Tax Deed which was attached and made a part of the Affidavit of Proof of Service affirmatively showed that sixty days had elapsed since the giving of notice to May W. Bentley. An examination of this Notice of Application for Tax Deed beyond

all doubt shows that same does not supply the defect stated above. The Notice of Application for Tax Deed recites:

> "That at least sixty days will have expired after the service of this notice upon the defendant."

Such a statement merely recited a fact that the county clerk and recorder intended to be done, and does not state that the fact or deed itself was done. For aught that appears from the Affidavit of Proof of Service together with the copy of the Notice of Application for Tax Deed referred to and attached to the Affidavit, attempted service upon May W. Bentley, the then record owner of the lands involved, was made less than sixty days prior to the request or application for the tax deed.

The learned trial judge in his written opinion that appears on page 23 of the transcript states that:

> "The instruments in Exhibit 'D' herein at that time were on file in the office of the County Clerk and Recorder and available for inspection, as public records, by the County Treasurer, when he personally appeared in that office for inquiry or question with respect to authority or jurisdiction or any other purpose, so that it would seem, in addition to the proof made herein, the maxim is applicable that means of knowledge and knowledge itself are, in effect, the same thing."

The above quoted portion of the judges' opinion is directly contrary to the case of *Perry v. Maves, supra,* and in addition is directly contrary to

> *Lowery v. Garfield County,*
> 122 Mont. 571, 580, 208 Pac. (2d) 478,

wherein the Court stated:

> "His authority to execute the deed must be shown in and appear upon the face of the affidavit."

Appellee Rosebud County has contended that when a county applies for a tax deed, it is not necessary that *any* affidavit be filed in the office of the county treasurer. Such a contention is

wholly contra to the Perry case, *supra.* The Perry case unequivocally held that in order for McCone County, Montana, to obtain a valid tax deed to lands, a *sufficient* affidavit *must* be filed by the County of McCone with the county treasurer, and since no sufficient affidavit was filed, the tax deed issued to McCone County, Montana, was declared void. In view of this holding in the Perry case, to claim that no affidavit whatsoever need be filed is incomprehensible.

(b) We now direct this brief to the second defect in the tax deed proceedings of Rosebud County, Montana, i.e., the insufficiency of the property description contained in the Certificate of Tax Sale (Exhibit 1 (A)). This Certificate of Sale merely recites that

> "Frank Bentley was duly assessed upon the assessment book of Rosebud County for the year 1935, for the following described real property, to-wit:
>
> All Sec. 15-11-32."

There is not, of course, any section of land in the state of Montana called "15-11-32".The appellee claims that the real meaning of this description is Section 15 in Township 11, Range 32. The description, however, does not state that the figure 11 is referring to a township or that the figure 32 is referring to a range, and neither does the description state whether the township or range, if that are what the numbers refer to, are north or south of the base line or east or west of the meridian. It might well be said that the figures used in the tax certificate more closely resemble a social security number than they do a description of land.

At the trial of the case and over objection of the plaintiff, (Trans. pp. 41-43) parol evidence was introduced attempting to

explain and correct the mis-description involved. In the case of

Miller v. Murphy,
119 Mont. 393, 175 Pac. (2d) 182,

the court said as follows:

" 'The land here sued for, as described in the complaint, is designated as "lots number 4 and 5, in Square number 39, of what has heretofore been known as the Fisher tract." The land described in the assessment and the tax deed is as follows: "2/3 of Square 39 in Fisher tract." The ambiguity patent on the face of this description is obvious. It may mean (1) an undivided two-thirds interest, held by the owner, Fisher, by way of tenancy in common; or (2) it may mean an entirety of two-thirds in area of the whole square. Which of the two is intended, it is impossible to say; and the ambiguity being patent, cannot be corrected by the introduction of extrinsic or parol evidence. Similar descriptions have been adjudged by other courts to be void for uncertainty. Bidwell v. Coleman, 11 Minn. 78, 91; Adams v. Larrabee, 46 Me. 516, 519; Burroughs on Tax, 203-205; Hilliard on Tax, 517, sec. 12.' Dane v. Glennon, 72 Ala. 160, 162.

" 'In tax proceedings "the description must be certain of itself, *and not such as to require evidence aliunde to render it certain.* * * * Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by the payment of the taxes thereon, and to impart information to bidders of the actual extent and location of the premises to be sold. *All subsequent proceedings depend upon this certainty.* An inaccurate or an uncertain description defeats every step subsequently taken, and, as we have already said, *the uncertainty cannot be cured by evidence aliunde.*" Keane v. Cannovan, 21 Cal. (291), 302, 82 Am. Dec. 738. See, also, Roberts v. Chan Tin Pen, 23 Cal. (260), 267; Mountain Club v. Pinney, 67 Cal. App. (225), 251, 227 Pac. 630; Miller v. Williams (135) Cal. 183, 67 Pac. 788 and Smith v. City of Los Angeles (158 Cal. 702, 112 Pac. 307), supra.' Stewart v. Atkinson, 96 Cal. App. 50, 273 Pac. 606, 608."

Though the Miller case, *supra,* was concerned with the desciption in the Notice of Application for Tax Deed rather than

the Certificate of Tax Sale, the same principle applies to the Certificate of Tax Sale for it is from this certificate that the property description is obtained by the proper county officers on later instruments. In the case of

Wilson v. Jarron (Ida.),
131 Pac. 12,

the court said:

"It will be noticed that this description does not recite the county in which the property is situated, nor does it state whether the township is north or south, nor does it show whether the range is east or west, nor does it give the meridian from which these numbers are computed. After the expiration of the three-year period for redemption from this sale, the taxes not having been paid, the assessor upon application of the owner and holder of the tax sale certificate issued to him a tax deed. This tax deed, which, by the way, was executed by the successor in office of the assessor who executed the tax sale certificate, describes the property conveyed as follows: 'The south half of the Northeast quarter of section 1, township four north, range two West, Boise Meridian, Canyon County, State of Idaho.' It is apparent, and must be admitted, that the description contained in the deed is a good description of the particular tract of real estate described in the deed. It is equally clear that the assessor who executed this deed could not, and did not, get this full description from the tax sale certificate which had been previously issued to his predecessor. It was necessary for him to ascertain in some other manner and from some other source that the township was north, instead of south, and that the range was west, instead of east, and that the county in which the property was located was Canyon."

"It would, however, be a wide sweep of the imagination to say that, notwithstanding this variance, there has nevertheless been a substantial compliance with the statute, and that the description contained in this tax deed is substantially the same as that contained in the certificate. It is not substantially the same—the first description fails to locate or describe any tract of land. Reverting to the description

found in this certificate, and analyzing it for a minute, it will be seen that it would have been just as competent and equally as substantial a compliance with the statute for the assessor to have made a deed describing this property as being in township 4 south as 4 north, or in range 2 east as in range 2 west, either north or south of the base line."

Even if the evidence of H. D. Young were admissible (which plaintiffs positively deny), his testimony at all times assumes that the figure "11" is referring to a township and that the figure "32" is referring to a range, without stating any custom or usage or other reason for these assumptions. (Trans. pp. 41-43)

II.

ANY DEFENSE OF ADVERSE POSSESSION BY THE DEFENDANT, ROSEBUD COUNTY, MONTANA, HAS BEEN ABANDONED.

Though the appellee, Rosebud County, Montana, pleaded an affirmative defense of adverse possession, the only possible evidence introduced upon the trial of adverse possession was contained in a written deposition taken previous to the trial of the cause. This deposition has not been certified to this court, the deposition was not designated by either the appellant or the appellee to be part of the record on appeal, and therefore under the rules of this court such affirmative defense has been abandoned by the appellee and therefore no argument is made herein concerning the pleaded defense of adverse possession.

III.

AFFIRMATIVE DEFENSE OF RES ADJUDICATA BY A FORMER JUDGMENT IS WHOLLY INSUFFICIENT.

The defendant, Rosebud County, Montana, has pleaded in its Answer (Trans. pp. 9-11) an affirmative defense of *res adjudicata* to the effect that the plaintiffs' claims are barred by reason of the rendition of a certain judgment in Civil Cause

No. 5475 in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud, wherein one Roy M. King is the plaintiff and Rosebud County, Montana, May W. Bentley, and unknown owners, etc., are the defendants. Appellants maintain that this judgment is not a bar to the appellants as against Rosebud County, Montana, for three reasons, which will be discussed separately below, to-wit:

(a) The estoppel of the judgment is not mutual between the appellants and Rosebud County, Montana;

(b) Rosebud County, Montana, and May W. Bentley were not adversaries in the previous action; and

(c) The court in which the judgment was obtained did not have jurisdiction over May W. Bentley.

(a) In order to discuss item (a), lack of mutuality of estoppel, it must be noted that no valid service was obtained upon the County of Rosebud, Montana, in the action in which the judgment was obtained that has been pleaded by the defendant, Rosebud County, Montana. It affirmatively appears from the judgment roll (Exhibit 4) that service of summons and complaint upon the body corporate, Rosebud County, Montana, was made by personally serving "G. W. Gray, Clerk, ex officio Board of County Commissioners, Rosebud County, Montana," whereas *section 9111, Revised Codes of Montana, 1935, paragraph 5* thereof, reads as follows:

> "The summons must be served by delivering a copy thereof, as follows: . . . 5. If against a county, city or town, to the president or chairman of the Board of County Commissioners, president of the Council or trustees, mayor, or other head of the legislative department thereof."

It also affirmatively appears from Exhibit 4 that the default of Rosebud County, Montana, for failure to appear, answer or otherwise plead to the complaint was entered by the plaintiff

in the action that has been pleaded, and that Rosebud County, Montana, did not enter an appearance in the action. It therefore follows that in the action pleaded the court did not have jurisdiction over Rosebud County, Montana, and therefore Rosebud County, Montana, was not in anywise bound by the judgment obtained in that action.

Since the defendant, Rosebud County, Montana, was not and is not bound by the judgment they have pleaded as an affirmative defense, the law is clear that Rosebud County, Montana, cannot set up such a judgment as a bar against anyone else. The rule is probably best stated in

30 Am. Jur. 951,

wherein it is stated:

> ". . . One of the essential elements of the doctrine is that both the litigants must be alike concluded by the judgment, or it binds neither. Under this rule, if a judgment cannot be effective as res adjudicata against a person, he may not avail himself of the adjudication and contend that it is so available against others, as between them and himself."

The Montana Supreme Court recognized this rule in the case of

Wallace v. Goldberg,
72 Mont. 234, 231 Pac. 56,

wherein the Montana court, quoting 1 Freeman on Judgments, 4th ed., Section 159, stated as follows:

> "It is essential to an estoppel that it be mutual, so that the same parties or privies may both be bound and take advantage of it."
>
> "No man shall bind himself by any adjudication which he is himself at liberty to disregard."

In the last cited Montana case, the rule announced was not applied, since the Montana court found from the facts that the judgment set up as a bar was mutual between the parties, but the case clearly shows that mutuality of estoppel is recognized

in Montana as it is in practically all other states. In the case of

Bennett v. General Accident, Fire & Life Assurance Corp. (Mo.), 255 S. W. 1076,

the court said:

"The judgment must conclude both parties or it will conclude neither. Estoppels must be reciprocal and bind both parties; they operate only on parties and privies and can be used neither by nor against strangers. He that shall not be concluded by the judgment shall not conclude another by it. No person can bind another by any adjudication who was not himself exposed to the peril of being bound in a like manner had the judgment resulted the other way. Nobody can take benefit by a verdict that had not been prejudiced by it had it gone contrary." (citing numerous cases)

Other cases announcing this rule are as follows:

Davis v. First National Bank of Waco (Tex.), 161 S. W. (2d) 467
("A party who is not bound by a judgment is not permitted to assert that another is estopped by it . . . (citing cases) The reason for this rule is the same as that which Freeman says 'underlies the whole doctrine of res adjudicata' and in his language is 'that a person should not be bound by a judgment except to the extent that he, or someone representing him, had an adequate opportunity not only to litigate the matters adjudicated, but to litigate them against the party (or his predecessor in interest) who seeks to use the judgment against him.' Freeman on Judgments, 5th ed., p. 918, paragraph 422.")

Schafer v. Robillard (Ill.), 17 N. E. (2d) 963
("As to the claim of estoppel by Robillard's suit to quiet title to the strip east of the east line of Osborne Avenue, it is only parties and their privies, in blood or estate, that are estopped by a decree or judgment. Parties to

> a decree in the eye of the law are those, only, who are named as such in the record, and are properly served with process or enter their appearance. A privy to a judgment or a decree is one whose succession to the right of property thereby affected occurred after the institution of the particular suit, and from a party thereto.")

Nor can the defendant, Rosebud County, Montana, claim that it is privy with Roy M. King, plaintiff, in the action pleaded as a bar, for Rosebud County, Montana, does not claim through Roy M. King or his successors, but rather claims ownership through a tax deed purportedly given prior to the time that Roy M. King received any color of title. The case of

Teisinger v. Hardy,
86 Mont. 180, 282 Pac. 1050,

is one where the plaintiff therein claimed that a former judgment was binding against one of the defendants in the action even though such defendant was not a party to the former action upon the theory that such defendant was in privy with one of the parties to the former action previous to the time such action was commenced. The Montana court said:

> "Freeman in his work on judgments declares that 'it is well understood, though not usually stated in express terms in works on the subject, that no one is a privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit.' (1 Freeman on Judgments, 4th ed., 162)
>
> "One is not a privy to a judgment where his succession to the rights of property thereby affected occurred previous to the institution of the suit. . . ." (citing cases)

(b) The second reason why the judgment is insufficient as pleaded and proved by the defendant, Rosebud County, Montana, i.e., because the judgment acted both against Rosebud County, Montana, and the plaintiff herein, May W. Bentley,

is also a well recognized rule in the law of res adjudicata or estoppel by judgment. The general rule is stated in 30 Am. Jur. 966 as follows:

> "The general rule is that parties to a judgment are not bound by it in subsequent controversies between each other, where they are not adversary in the action in which the judgment is rendered."

At page 967:

> "The theory of the many decisions supporting the general rule is that the judgment merely adjudicates the rights of the plaintiff as against each defendant and leaves unadjudicated the rights of the defendants as among themselves."

This rule is recognized in Montana in the case of

Hogan v. Thrasher,
72 Mont. 318, 233 Pac. 607,

where the court states:

> "In passing we observe that, since Thrasher and Hogan were co-defendants in cause 517, the judgment in that action cannot be relied upon as *res adjudicata* in this one,-unless they were adversary parties in that cause."

The above statement was not necessary to the decision in the case cited, since the Montana court held that the judgment roll was not properly admitted in evidence, but the case does declare the doctrine in Montana.

The rule is likewise enunciated in

101 A. L. R. 105,

where it is said:

> ". . . The rule supported by the great weight of authority is that a judgment in favor of the plaintiff in an action against two or more defendants is not res adjudicata or conclusive of the rights and liabilities of the defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in the first action, by cross complaint or other adversary p'eadings and determined by the judgment in the first action." (citing cases)

Again in 50 C. J. S. 372, it is said:

> "The estoppel, however, is raised only between those who were adverse parties in the former suit and the judgment therein ordinarily settles nothing as to the relative rights or liabilities of the co-plaintiffs or co-defendants inter sese, unless their hostile or conflicting claims were actually brought in issue, litigated and determined. . . ."

Since it affirmatively appears in the judgment roll that neither Rosebud County, Montana, nor May W. Bentley, both named as defendants in the action pleaded as a bar to this suit, entered an appearance or filed any pleadings of any kind, it cannot be said that they were adversaries in the action pleaded, and under the rule as set forth above the defendant, Rosebud County, Montana, cannot bar the claim of the plaintiffs in this cause.

It should be noted by the court that the judgment pleaded by the defendant, Rosebud County, Montana, holds that neither Rosebud County, Montana, nor May W. Bentley, nor the other defendants, have any interest in the real property involved. Your writer is frank to say that he has found no cases wherein a judgment has been pleaded as a bar when the judgment pleaded states that the one setting up the judgment in the second action has no rights. Such an attempted defense of res adjudicata is anomalous and completely self-contradicting since the judgment set up as a bar by Rosebud County, Montana, purports to bar Rosebud County, Montana.

(c) The third and final reason why the judgment pleaded is no bar to the appellants herein is that no proper service of process in that action was had upon May W. Bentley, and therefore the court had no jurisdiction over her and likewise the judgment would then be not binding upon her assigns, the other plaintiffs and appellants in this cause. An examination of the

judgment roll (Exhibit 4) shows that there was no personal service upon May W. Bentley and such service as was had was made by publication of summons.

The procedure to obtain an order for publication of summons is set forth in *Section 9482, Revised Codes of Montana, 1935,* and we quote the pertinent parts involved:

> "9482. Service of summons by publication, when. When any defendant specifically named in such complaint resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, . . . , the plaintiff, upon the return of the summons showing due personal service within the state upon all defendants specifically named in the complaint, other than such as come within the meaning of the foregoing provisions of this section, and upon filing with the clerk of said court an affidavit *setting forth the facts with reference to any of such defendants* upon whom personal service of summons within the state cannot be made, within the meaning of the foregoing provisions of this section, may obtain an order for the service of summons upon such defendants last mentioned, to be made by publication." (Emphasis ours)

To further abstract the above statute and so that this court can conveniently analyze the requirements, the four conditions are here set forth which must be shown in order that an order for publication of summons can be issued by the court, to-wit:

1. When any defendant resides out of the state;
2. When any defendant has departed from the state;
3. When any defendant cannot, after due diligence, be found within the state;
4. When any defendant conceals himself to avoid the service of summons.

First of all, it is to be noted that the four conditions as set forth above are actually "conclusions of fact." Not only does the affidavit for publication of summons in question fail to set out any facts from which any one of the above conclusions can

be reached, but it doesn't even recite or allege the *ultimate conclusion of fact.*

In order to examine the affidavit for publication of summons involved, it is here set forth in its entirety, to-wit:

"AFFIDAVIT FOR PUBLICATION OF SUMMONS. Filed February 3, 1947.

F. F. Haynes, being duly sworn, deposes and says as follows:

I am the Attorney for the Plaintiff in the above entitled action. The complaint in said action was duly filed with the Clerk of this Court on the 16th day of October, 1947, and summons thereupon issued; and the said action is brought for the purpose of quieting title.

The Defendants hereinafter named last resided at: Lena E. Hess, Forsyth, Montana, Dorothy Hess, Forsyth, Montana; May W. Bentley, Madison, Wisconsin; (and other Defendants not pertinent to this abstract); diligent search and inquiry has been made in and about Rosebud County, Montana, for information as to the address of unserved defendants and except as hereinbefore set forth they cannot be determined; inquiry was made of the Forsyth, Ingomar, Vananda Postmasters and local merchants at said towns and of merchants and older residents and no present addresses determined;

That a Summons was duly issued out of this Court to the Sheriff of the County of Rosebud with directions to said Sheriff to serve the same upon said Defendants, and the said Sheriff returned the same to the Clerk of this Court, with his return thereon endorsed, to the effect that the said defendants could not be found in his County of Rosebud except as shown by his return.

I have fully and fairly discussed the facts of the case with the Plaintiff and I have informed him, and I verily believe, that he has a good cause of action in this suit against the said defendants, to whom the service of this summons is to be made, and that they each are necessary and proper parties to this action, as will fully appear by my verified complaint filed herein, to which reference is

hereby made, as I am advised by my said counsel after such statement made, as aforesaid, and as I verily believe.

Personal service of said summons cannot be made on the said Defendants not shown to have been personally served by the returns herein after due and diligent search and inquiry as above shown herein and I therefore demand an order that service of the same may be made by publication.

Signed, F. F. Haynes,
Duly verified."

Now, to more or less dissect the above affidavit, following are listed the allegations set forth in the affidavit separately in order to ascertain if they fulfill the requirements of the aforementioend statute. They are as follows, to-wit:

1. The defendants hereinafter named last resided at: * * * May W. Bentley, Madison, Wisconsin;
2. Diligent search and inquiry has been made in and about *Rosebud County, Montana,* for information as to the *address* of unserved defendants, and except as hereinbefore set forth they cannot be determined; inquiry was made of the Forsyth, Ingomar, Vananda Postmasters and local merchants at said towns and of merchants and older residents *and no present addresses determined;*
3. * * * and the said Sheriff returned the same to the Clerk of this Court, with his return thereon endorsed, to the effect that the said defendants could not be found in his *County of Rosebud* except as shown by his return. (Even this allegation is shown by an examination of the judgment roll to be untrue as we will later develop);
4. Personal service of said summons cannot be made on the said Defendants not shown to have been personally served by the returns herein after due and diligent search and inquiry as above shown herein and I therefore demand an order that service of the same may be made by publication.

By comparing the four allegations as separately stated and numbered above with the four conditions as set out under *Section*

9482, Revised Codes of Montana, 1935, it is patent that there was not any compliance with the statute involved, and therefore because of the insufficiency of the affidavit for publication of summons, the order as issued by the judge was invalid and ineffective. The matter is controlled by the Montana case of

Aronow v. Anderson,
110 Mont. 484, 104 Pac. (2d) 2.

We quote from that decision at two different places, the first on page 485 as follows:

> " 'That the following named defendants (including Anderson) *reside out of the State of Montana,* and cannot after due diligence be found within the State of Montana, and thatt he last known residence' of Anderson is Shelby, Montana."

Even the above allegation at least sets forth the *ultimate conclusion* that the defendant "resides out of the State of Montana." This is much more than the affidavit in question does. In holding that the affidavit in the Aronow case was insufficient, the court said as follows, at page 487:

> "It is our view that under section 9482 the affidavit must show the evidentiary facts upon which the ultimate fact is asserted that the defendant resides out of the state before a valid order for publication of summons can be made. If this were not so, there would have been no occasion for section 9484. The naked allegation that defendant resides out of the state, without a statement as to where he does actually reside, is not sufficient without a recitation of facts upon which the ultimate fact is based. This is particularly true in view of the fact, as here, that it is recited that Anderson's last known residence was Shelby, Montana, which negatives the idea that he was known to reside outside the state of Montana.
>
> "Cases from other courts are of but little aid in view of differences in the statutes of the several states. See, however, cases listed in the note in 37 L. R. A. (n. s.) 211 et seq."

Nor can the defendant, Rosebud County, Montana, argue that even if the affidavit for publication of summons is insufficient, the judgment is not subject to collateral attack. This question is adequately covered by decisions of the Montana State Supreme Court, and in particular we refer the court to the case of

West v. Capital Trust & Savings Bank,
113 Mont. 130, 124 Pac. (2d) 572.

This case was decided in March of 1942 and sets forth the governing rules upon the question of collateral attack upon a judgment. For the court's guidance we quote at page 137 of that decision:

> "If the allegations of the pleadings showed affirmatively a want of jurisdiction, then plaintiff's contention would be sound and there would be no presumption in favor of jurisdiction. The rule is stated in 34 C. J. 551, as follows: *'Where the facts upon which a court assumes jurisdiction are recited in the record, and appear by it to have been such as would not in law confer jurisdiction, the judgment may be impeached collaterally;* for in this case there can be no presumption, in aid of the judgment, that the recitals of the record are incorrect or incomplete, or that something was due which the record does not show to have been done, the whole record being taken together for this purpose. Thus, where the judgment recites that defendant was duly served with process, but the record shows that no service was made, *or shows a service which is insufficient and unauthorized* by law, it may be collaterally impeached.' " (Emphasis ours)

We call the court's attention to the fact that in the West case they were dealing with a foreclosure suit, and not one dealing with an action to quiet title. Mention is made of this fact in the opinion rendered by Judge Angstman on the motion for rehearing. We specifically and emphatically call the court's attention to the term used "presumption of jurisdiction." The best example of this matter of indulging in a presumption of jurisdiction is in the type of case where there is a loss or absence

of parts of the record. In such cases the presumption of jurisdiction attaches, and the court presumes that there was at some time a proper instrument but that the same became lost from the record. As a matter of fact, this exact situation was present in the West case above quoted. We now refer the court to the case of:

Hinton v. Staunton,
124 Mont. 534, 228 Pac. (2d) 461.

In this particular case the court held that the particular affidavit in question was sufficient, and we quote from that case as to the allegations contained in the affidavit, to-wit:

> " 'the President, Vice President, Cashier or other officer of the said defendants * * * Grass Creek Oil and Gas Company, a corporation, * * * upon whom service could be made, *and that there is no such agent or officer of said corporation in the State of Montana* upon whom service could be had.' "

Here again at least the conclusion is stated that there was no agent or officer of said corporation in the state of Montana upon whom service could be had. Actually the Hinton case is no authority in regard to the question of the sufficiency of the affidavit in our present case. Such affidavit and order for publication of summons were obtained under the general statutes for service of Summons and in particular *Section 9112, Revised Codes of Montana, 1935,* and in the present case service was obtained under the special statutes contained in the Action to Quiet Title Section. Such a distinction between service on a corporation and service on an individual was an important factual element of that case.

It therefore affirmatively appears from the judgment roll and from the law of the State of Montana that due process was not followed in an attempt to obtain service by publication of summons upon May W. Bentley and that therefore the judgment

pleaded by Rosebud County, Montana, as a bar is void to May W. Bentley and her assigns.

Conclusion

We submit that the tax deed obtained by Rosebud County, Montana, against May W. Bentley is void for the reasons that (1) the Affidavit of Proof of Service is insufficient under the doctrine announced by the Montana Supreme Court in the case of Perry v. Maves, *supra,* and (2) the Certificate of Tax Sale does not sufficiently describe the real property for which a tax deed was taken by the County of Rosebud, Montana, in accordance with the authorities herein cited.

The then only remaining question to be resolved is whether or not the judgment pleaded and in evidence was properly admitted in evidence, and, if so, whether such judgment is a bar to these appellants. We submit that it is not such a bar for the reasons that (1) the estoppel by judgment is not mutual, (2) there were no adversary proceedings between Rosebud County, Montana, and May W. Bentley in the action wherein the judgment pleaded was obtained, and (3) the judgment is not a bar to May W. Bentley or her assigns because no valid service was made upon May W. Bentley and therefore the court did not have jurisdiction over her, thereby rendering the judgment as against May W. Bentley a nullity.

Respectfully submitted,
BROWN, SANDE & FORBES
By CHARLES B. SANDE
Attorneys for Appellants.

By.....